Kumpolan Kemajuan Raya Sdn Bhd v Faidz Darus

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2-24-32-96
KL REKHRAJ JC
22 MARCH 1996

Bankruptcy *— Notice — Founded on consent judgment against partnership — Judgment given in sessions court — Execution proceedings against individual partners by way of bankruptcy proceedings — Whether application for leave to be made to sessions court or High Court — Bankruptcy Rules 1969 r 91(4) — Subordinate Courts Rules 1980 O 10 r 5(4) & (5)*

Bankruptcy *— Partnership — Leave to commence bankruptcy proceedings against individual partners — Bankruptcy notice founded on consent judgment against partnership — Whether partner may dispute liability — Whether application for leave to be made to sessions court or High Court — Subordinate Courts Rules 1980 O 10 r 5(5) — Bankruptcy Rules 1969 r 91(4)*

The plaintiffs in this case had obtained a consent judgment given by one of the partners of Faidz Darus & Weng On which was a partnership being sued as a firm in an action filed in the Sessions Court, Kuala Lumpur. Following this, the plaintiffs proceeded to commence execution proceedings against the individual partners of the firm by filing an originating summons in the High Court under O 77 r 5(4) and (5) of the Rules of High Court 1980 ('the RHC') for leave as required by r 91(4) of the Bankruptcy Rules 1969 which laid down a requirement for the leave of the court before a final judgment or final order against a partnership could be used to found a bankruptcy notice against a partner. It was submitted that as the intended execution proceedings was by way of bankruptcy proceedings, which could only be filed in the High Court, such leave as envisaged under r 91(4) of the Bankruptcy Rules 1969 could only be obtained from the High Court. The issue for consideration was whether the originating summons was properly made to the High Court, or whether the application should have been made to the very court where the judgment was given against the firm, which was the sessions court.

Held, dismissing the application:

(1) The Subordinate Courts Rules 1980 ('the SCR') had a specific provision under O 10 r 5(4) and (5) which paralleled the provision in O 77 r 5 (4) and (5) of the RHC, and since each rule defined 'the court' as the sessions court and the High Court respectively, thus 'the court' would have to be the court under that very rule. Since the judgment was that of the sessions court obtained under the SCR, the application should have been made to the sessions court (see p 38F).

(2) The judgment taken against the firm though final on the record, was open to challenge on an application for leave to execute against the partners because pursuant to O 10 r 5(5) of the SCR,

the individual partner had a right to challenge the liability. If he did, the court might order that his liability be tried and determined before such leave could be granted and this could only be effectively done in the very forum where the judgment was pronounced and where the relevant cause papers were presently kept. In the present case, the sessions court, and not the High Court, would be the proper court to apply to for leave (see p 38G).

[Bahasa Malaysia summary

Plaintif di dalam kes ini telah memperolehi suatu penghakiman persetujuan yang diberikan oleh salah seorang daripada rakan-rakan Faidz Darus & Weng On yang merupakan suatu perkongsian yang disaman sebagai suatu firma di dalam suatu tindakan yang difailkan di Mahkamah Sesyen, Kuala Lumpur. Berikutan dengan itu, plaintif telah memulakan prosiding pelaksanaan terhadap rakan-rakan individu firma tersebut dengan memfailkan suatu saman pemula di Mahkamah Tinggi di bawah A 77 k 5(4) dan (5) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk kebenaran seperti yang dikehendaki oleh k 91(4) Kaedah-Kaedah Kebankrapan 1969 yang memperuntukkan suatu keperluan untuk kebenaran mahkamah didapati sebelum sesuatu penghakiman muktamad atau perintah muktamad terhadap satu perkongsian boleh digunakan untuk menyokong suatu notis kebankrapan terhadap seseorang rakan. Telah dihujah bahawa oleh kerana prosiding pelaksanaan yang diniatkan adalah melalui cara prosiding kebankrapan, yang hanya boleh difailkan di dalam Mahkamah Tinggi, kebenaran tersebut seperti yang dibayangkan di bawah k 91(4) Kaedah-Kaedah Kebankrapan 1969 hanya boleh didapati daripada Mahkamah Tinggi. Isu untuk pertimbangan adalah sama ada saman pemula tersebut telah dibuat secara betul kepada Mahkamah Tinggi, atau sama ada permohonan tersebut sepatutnya telah dibuat kepada mahkamah di mana penghakiman telah pada mulanya diberikan terhadap firma tersebut, iaitu mahkamah sesyen.

Diputuskan, menolak permohonan itu:

(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') mempunyai peruntukan yang spesifik di bawah A 10 k 5(4) dan (5) yang berjalan selari dengan A 77 k 5(4) dan (5) KMT, dan oleh kerana setiap kaedah mentakrifkan 'mahkamah itu' sebagai mahkamah sesyen dan Mahkamah Tinggi masing-masing, maka 'mahkamah itu' semestinya adalah mahkamah di bawah kaedah itu juga. Memandangkan yang penghakiman tersebut adalah penghakiman mahkamah sesyen yang diperolehi di bawah KMR, permohonan ini sepatutnya dibuat kepada mahkamah sesyen (lihat ms 38F).

(2) Penghakiman yang diambil terhadap firma tersebut walaupun pada rekod adalah muktamad, masih terbuka untuk dicabar

dalam suatu permohonan untuk kebenaran untuk pelaksanaan terhadap rakan-rakan itu kerana mengikut A 10 k 5(5) KMR, setiap rakan individu berhak untuk mencabar liabiliti itu. Jika beliau berbuat demikian, mahkamah boleh mengarahkan bahawa liabilitinya dibicarakan dan ditentukan sebelum kebenaran tersebut boleh diberikan dan ini hanya boleh dilakukan secara berkesan di dalam forum di mana penghakiman itu telah diberikan dan di mana kertas-kertas kausa yang relevan kini disimpan. Di dalam kes ini, mahkamah sesyen, dan bukannya Mahkamah Tinggi, akan menjadi mahkamah yang sesuai untuk menerima permohonan untuk kebenaran (lihat ms 38G).]

Notes

For a case on leave to execute bankruptcy proceedings against a partnership, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1476.

Legislation referred to

Bankruptcy Rules 1969 r 91(4)
Rules of the High Court 1980 O 77 rr 5(4), (5), 6(1)
Subordinate Courts Rules 1980 O 10 r 5(4), (5), O 30

CH Lim (*Zain & Co*) for the plaintiffs.

KL Rekhraj JC: The plaintiffs had proceeded with an action in the Sessions Court, Kuala Lumpur, against the defendants, Faidz Darus & Weng On ('FDWO'), sued as a firm, and obtained a consent judgment given by one of the partners of the firm.

The plaintiffs are now desirous of taking execution proceedings against the individual partners of the firm by instituting bankruptcy proceedings, and in that regard filed an originating summons under r 91(4) of the Bankruptcy Rules 1969 for leave. The rule reads:

> In the case of a final judgment or final order against a partnership and if the individual partners were not served with the writ of summons in the suit in which the final judgment or final order was obtained, the final judgment or final order cannot be used to found a bankruptcy notice against a partner without leave of the *Court*. (Emphasis added.)

The plaintiffs filed this application in the High Court for such leave under O 77 r 5(4) and (5) and r 6(1) of the Rules of the High Court 1980 ('the RHC') which provide:

> 5(4) Where a party who has obtained a judgment or order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by summons which must he served personally on that person.

(5) Where the person against whom an application under paragraph (4) is made does not dispute his liability, the Court hearing the application may, subject to paragraph (3), give leave to issue execution against that person and, where that person disputes his liability, the Court may *order that the liability of that person be tried and determined* in any manner in which any issue or question in an action may be tried and determined. (Emphasis added.)

6(1) Execution to enforce a judgment or order given or made ... shall not issue except with the leave of the Court.

The point for consideration was whether this originating summons was properly made to the High Court, or should such an application be made to the very court where the judgment was given against the firm; as O 10 r 5(4) and (5) of the Subordinate Courts Rules 1980 ('the SCR') makes a similar provision as that set out under O 77 r 5(4) and (5) of the RHC.

The plaintiffs' solicitors submitted that as the intended execution proceedings are by way of bankruptcy proceedings, which can only be filed in the High Court, *such leave* as envisaged under r 91(4) of the Bankruptcy Rules 1969 can only be obtained from the High Court and not from the subordinate court as O 30 of the SCR only provides three modes of enforcement of judgments, viz:

(a) writ of seizure and sale;

(b) garnishee proceedings;

(c) in a case in which r 5 applies, by an order of committal.

This argument/submission was rejected on the ground that the judgment being that of the sessions court obtained under the SCR which has a specific provision under O 10 r 5 sub-rr (4) and (5) which parallels the provision in O 77 r 5 sub-rr (4) and (5) of the RHC and each rule defining *the Court* as the sessions court or the High Court respectively, thus the court would have to be the court under that very rule. Further the judgment taken against the firm though final on the record, was open to challenge on an application for leave to execute against the partners — in that the individual partner had a right under O 10 r 5 sub-r (5) to challenge the liability and if he did, the court might order that the liability of that person be tried and determined before such leave could be granted, and this certainly could only be effectively done in the very forum where the judgment was pronounced and where the relevant cause papers were presently kept, and not in the High Court.

Thus the application for leave in the High Court was refused and the originating summons was dismissed with liberty to the plaintiffs to file such application in the sessions court.

Application dismissed.

Reported by CK Ong